

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GIOVANNI KOESE-ERIC CASPER,

Defendant-Appellant.

UNPUBLISHED

January 20, 2009

No. 280261

Kent Circuit Court

LC No. 06-012242-FC

Before: Beckering, P.J., and Whitbeck and M. J. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to life imprisonment without the possibility of parole for the first-degree murder conviction, which was to run consecutive to two years' imprisonment for the felony-firearm conviction. Because we conclude that there were no errors warranting relief, we affirm.

Defendant's convictions arose out of the shooting death of Kenneth Dear at a roller-skating rink. Testimony at trial established that defendant and Dear were from rival gangs and that both were present at the rink during a large social event. At some point during the evening, a fight broke out between members of the two gangs. After security broke that fight up, another fight erupted after defendant approached Dear. Testimony established that defendant was standing in front of Dear with his arm extended in Dear's direction when Dear suffered a single fatal gunshot wound to the chest.

Defendant first argues that the trial court erroneously instructed the jury regarding the first and second-degree murder charges. However, because defendant's trial counsel affirmatively approved the jury instructions, he waived any claim of error. See *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000); *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004). Nevertheless, defendant also argues that, if this Court concludes that his trial counsel waived any objection to the instructions, his trial counsel was ineffective for failing to object to the instructions. The issue of ineffective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews the trial court's findings of fact for clear error and reviews questions of constitutional law de novo. *Id.* Because the trial court did not hold an evidentiary hearing on

this issue, this Court's review is limited to mistakes that are apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

In order to establish a claim of ineffective assistance of counsel, a defendant must demonstrate that his trial counsel's performance fell below an objective standard of reasonableness and was so prejudicial that he was denied a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). In order to establish prejudice, a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" *Id.* at 302-303, quoting *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997).

At trial, the court instructed the jury that, in order to prove first-degree premeditated murder, the jury had to find "that the defendant caused the death of Kenneth Dear; that is, that Kenneth Dear died as a result of a gunshot wound to the chest." The trial court gave a similar instruction as one of the elements of the lesser-included offense of second-degree murder.¹ On appeal, defendant contends that instructing the jury in this manner was tantamount to instructing the jury that, if it found that the victim died of a gunshot wound to the chest, it must also find that defendant caused the victim's death. We do not agree.

"Jury instructions should be considered as a whole rather than extracted piecemeal to establish error. Even if the instructions were somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v Henry*, 239 Mich App 140, 151; 607 NW2d 767 (1999) (citations omitted). When this instruction is read as a whole and in the light of the trial court's other instructions, it is clear that the jury had to find that Dear died of a gunshot to the chest and that defendant fired the shot. The second half of the instruction clarified the manner of Dear's death as a gunshot wound, which was the only manner of death at issue in this case. It did not negate the causation element required under the first half. Furthermore, it is unreasonable to conclude that the jury deliberated with the perception that defendant bore some kind of strict liability if Dear died from a gunshot, regardless of defendant's culpability in the shooting. The trial court instructed the jury that it must find that "defendant intended to kill Kenneth Dear," and that it "may infer that defendant intended to kill if he used a dangerous weapon in a way that was likely to cause death." Therefore, taken as a whole, the trial court's instruction fairly presented the causation element to the jury. For that reason, defense counsel cannot be faulted for failing to object. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004) (noting that defense counsel will not be faulted for failing to object when an objection is without merit or would be futile).

Defendant next argues that there was insufficient evidence of premeditation and deliberation to support his conviction for first-degree murder. This Court reviews challenges to the sufficiency of the evidence de novo. *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006). In making the review, this Court must consider the evidence in the light most

¹ These instructions were based on CJI2d 16.1(2) and CJI2d 16.05(2), which provide, in relevant part, that the trial court should instruct the jury "that the defendant caused the death of [name deceased], that is, that [name deceased] died as a result of [state alleged act causing death]."

favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id.* “This standard is deferential and requires that this Court ‘draw all reasonable inferences and make credibility choices in support of the jury verdict.’” *Id.*, quoting *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Further, “[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.” *Nowack, supra*.

To secure a conviction of first-degree premeditated murder, the prosecution must prove beyond a reasonable doubt that the killing was premeditated and deliberate. *People v Saunders*, 189 Mich App 494, 496; 473 NW2d 755 (1991). Premeditation may be proven through evidence of “(1) the prior relationship of the parties, (2) the defendant’s actions before the killing, (3) the circumstances of the killing itself, and (4) the defendant’s conduct after the homicide.” *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). In addition, to establish premeditation and deliberation, there must be a gap of time between the initial homicidal intent and the ultimate killing that is long enough that a reasonable person would take a “second look” at his actions. *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003). A pause of less than one minute between the initial manifestation of homicidal intent and the ultimate act may be sufficient time for a defendant to deliberate. See, e.g., *People v Tilley*, 405 Mich 38, 45; 273 NW2d 471 (1979).

The prosecution produced substantial evidence from which a jury could infer that defendant shot Dear with deliberation and premeditation. Testimony established that defendant and Dear had a prior antagonistic relationship. Defendant and Dear were in rival gangs, and the two groups had fought in the past. There was also evidence that defendant personally did not like Dear because Dear was dating one of defendant’s former girlfriends. In addition, a couple of days before the fight, defendant told friends that he was planning to fight Dear on the day of the shooting.

There was also testimony that, before any fighting began, defendant was staring at Dear. After a first fight between the rival gangs, someone passed defendant a gun, and then defendant approached Dear, which started the second fight. Testimony established that neither Dear nor defendant were involved in the first fight, and when defendant approached Dear, no words were exchanged. Hence, the evidence supports an inference that defendant was “undisturbed by hot blood” when he first took the gun and started toward Dear. See *People v Plummer*, 229 Mich App 293, 301-302; 581 NW2d 753 (1998). Further, although Dear stopped defendant’s approach and threw at least one punch, defendant had the presence to step back and shoot. Under these circumstances, a rational jury could have concluded that a reasonable person would have had an opportunity to take a “second look” at his actions. *Gonzalez, supra* at 641.

In addition, there was testimony that no one saw the gun in defendant’s hand at the time of the shooting because defendant had the gun positioned up his sleeve concealing it from the crowd. The fact that defendant had the foresight to conceal the weapon up his sleeve before confronting Dear supports a finding that defendant deliberated about his decision to shoot Dear. See *People v Waters*, 118 Mich App 176, 186-187; 324 NW2d 564 (1982) (noting that factors for premeditation and deliberation include whether the murder weapon had been acquired in preparation for the homicide). Finally, after the shooting defendant gave his clothing to a friend and told this friend that if he was contacted to pretend he did not know defendant.

Viewing the totality of this evidence in the light most favorable to the prosecution, a rational jury could have found that defendant deliberately, and with premeditation, shot Dear.

There were no errors warranting relief.

Affirmed.

/s/ Jane M. Beckering
/s/ William C. Whitbeck
/s/ Michael J. Kelly